IN THE

Supreme Court of the United States

OCTOBER TERM, 1904

No. 227

NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, his wife,

Appellants.

vs.

KATHERINE AUGUSTE McQUESTEN,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE.

This appeal attempts to challenge the jurisdicton of the Court below.

Federal jurisdiction is predicted on a diversity of citizenship and the appellants contend that a diversity of citizenship does not appear. The history of this question as presented by the record is as follows:

1. In her bill of complaint the respondent states the diversity of citizenship in these words: "Katherine Auguste McQuesten, a citizen of the United States and of the State of Massachusetts and residing at Turners Falls in said State, brings this her bill of complaint against Nicholas J. Steigleder and Christina Steigleder, his wife, citizens of the State of Washington and residing at the City of Seattle in said State." (Transcript of Record, p. 1.)

2. To the bill, the defendants below (Appellants in this Court) demurred for want of equity, and their demurrer was overruled. (Transcript of Record, p. 19.)

3. The defendants below then answered on the merits without even suggesting a question of jurisdiction. (Transcript of Record, pp. 7-8-9-10.)

4. The case was referred, proofs taken in full, and after the proofs had been taken, the defendants below (Appellants in this Court) made a motion in words and figures as follows:

I.

"That the above entitled action be dismissed for want of jurisdiction of this Honorable Court.

II.

For Damages and Solicitor's Fees.

That for grounds in support of said motion, defendants show:

I.

That the complainant is a resident of this State, and has been a resident of this State long prior to the commencement of this action, to-wit: Since June, 1902, and

that the defendants are also residents of this State, as will more fully appear by reference to the evidence filed herein.

II.

That complainant unnecessarily consumed a large amount of time in taking evidence before the master in chancery herein, to-wit: For five days, when one or two days would have been ample to have taken all testimony on behalf of complainant, all of which will more fully appear by reference to the testimony filed herein." Transcript of Record, pp. 19-20.

The Court will notice in passing that the motion challenges merely the plaintiff's *residence*, not her domicil, or citizenship.

5. The foregoing motion was argued and overruled; the Court's opinion is brief and reads as follows:

"The question which the Court has now to decide is whether the complainant can maintain her suit in this court as a citizen of the State of Massachusetts. The bill of complaint contains proper and sufficient averments to authorize the bringing of the suit in this court on the ground that the complainant is a citizen of the State of Massachusetts and the defendants citizens of the State of Washington, and the averments of jurisdictional facts are not controverted by the onswer or any special plea, therefore the court is warranted in taking cognizance of the case until it appears affirmatively that the complaint is not true in fact. The motion to dismiss is based upon an assumption that by the evidence it does appear affirmatively, that at the time of the commencement of the suit the complainant was not a citizen of the State of Massachusetts, because she had changed her residence from Massachusetts to the State of Washington and was then residing in the State of Washington. The evidence shows that at the time of commencing the suit, and for about four months

previous, she was and had been living in this State with her son, the two being the only members of the family. Jurisdiction, however, depends upon citizenship, and not upon the place of residence. It is true that by the 14th amendment to the Constitution, citizens of the United States are also citizens of the State in which they reside, but it has been settled by numerous decisions that a mere temporary change of residence from one State to another does not work a change of citizenship. In order that a change of citizenship from one State to another should affect the right of bringing a suit in a Federal Court, it must be made with a *bona fide* intention of becoming a citizen of the State to which the party removes. 6 Am & Eng. Encyc. of L., 2nd Ed., 32. The real question to be decided relates to the permanent domicil of the complainant rather than to the place of which she was an inhabitant at the time of commencing the suit.

"By the undisputed evidence it appears that she lived in the State of Massachusetts, and was permanently settled there, for a period of twenty years prior to the month of January, 192, and at that time on account of failing health she disposed of a mercantile business which she had been carrying on, and went to Europe, then returned to Massachusetts, remained there a few days, and she then came to this State, bringing with her all of her personal effects, and took up her residence in a house which she owned. Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also of deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother.

and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts."

"A domicil once acquired is presumed to continue until it is shown to have been changed. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicil two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

"*Mitchell, v. United States*, 21 Wall. 353; 6 Am. & Eng. Encyc. of L., 2nd Ed. 32; 10 Am. & Eng. Encyc. of L., 2nd Ed., 7-16; *In re Williams*, 99 Fed. Rep. 544; *Morris v. Gilmer*, 129 U. S. 315.

"I have not found in the evidence that the complainant was born in the United States, nor that she was naturalized or married to a citzen but as the pleadings raise no issue with respect to her citizenship, the Court will assume that she is a citizen of the United States until it is shown affirmatively otherwise. Motion to dismiss denied.

C. H. HANFORD, Judge."

Transcript of Record, pp. 11-12-13.

6. The case was afterwards argued on the merits and a decree rendered in favor of the plaintiff below, for the relief prayed for. So much for the history of this question.

THE QUESTION OF JURISDICTION AS PRESENTED BY THE RECORD.

1. In the assignments of error the question of jurisdiction is stated in this language:

I.

"The Court erred in taking jurisdiction of the bill of complaint and of the person of plaintiff herein, and also on June 10th, 1903, in denying defendants' motion to dismiss herein for want of jurisdiction."

II.

"The Court erred in entering a decree on February 4th, 1904, against defendants Steigleder and in favor of the plaintiff, said Court having jurisdiction neither of plaintiff nor of said cause." Transcript of Record, p. 35.

The assignments of error are clearly insufficient to raise the question of jurisdiction or any other question: the Court is obliged to look beyond the assignment and into the testimony to discover the point raised.

2. In the petition for appeal no definite question of jurisdiction is stated; it refers to the assignment of errors for a statement of the question. Transcript of Record, pp. 34-35.

3. In the certificate of the Court the question is stated in the following language: "Did the Court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?" Transcript of Record, p. 20. We submit that no question of jurisdiction is raised by the record.

ARGUMENTS AND AUTHORITIES.

I.

The defendants below (Appellants here) did not raise

the question of jurisdiction by any pleading; but on the contrary submitted to the jurisdiction; first, by demurring generally for want of equity; second, by answering without even suggesting a question of jurisdiction; third by going into the taking of testimony on the merits generally and taking testimony in full, before even suggesting a question of jurisdiction.

We submit the appellants cannot challenge the jurisdiction to which they voluntarily submitted. They may waive the error, if any, in taking jurisdiction. There is no pretense that they were misled or that they have made any new discovery; they knew as well when they first appeared in the action, as after the testimony was taken, whether the plaintiff was a citizen of Massachusetts or not; and with full knowledge, they voluntarily submitted to the jurisdiction of the Federal Court without even suggesting a doubt as to the diversity of citizenship. After the testimony had been taken, and then thinking that the testimony on this point was not very full, they made their motion to dismiss; we submit this motion is nothing more than a suggestion to the Court to do what it might have done without a motion, viz: Dismiss the action, if it appears "That such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." This motion does not entitle the defendants to insist that the Court shall dismiss the action; it might have been error, of which the plaintiff below could have complained, if the Court had dismissed the action; but so far as the defendants below are concerned they had voluntarily submitted to the jurisdiction with their eyes open, and they thereby waived any error, if error there was, in the action of the Court in refusing to dismiss the suit.

Their waiver of the point would not deprive the Court of the power to protect itself by dismissing the suit, *on its own motion*, if the jurisdiction was wrongfully invoked, but this power of the Court does not deprive the defendants of the power to waive all questions as to juris-

diction and by waiver to close their mouths, by a sort of estoppel, to urge the point, as error. Prior to 1875, the jurisdiction could not be challenged except by a plea to the jurisdiction. Since the enactments of the statute of 1875 the Court has possessed the power on its own motion at any stage of the proceeding, to dismiss whenever its rightful jurisdiction is wrongfully invoked; but this corrective power possessed by the Court has never been held to be a legal right of the parties. If the parties voluntarily submit to the Federal jurisdiction and make a proper case in their pleadings neither can challenge the Court's action in retaining jurisdiction even though there may not be an actual diversity of citizenship. In such a case the Court may protect itself from imposition, but this power is not a legal right in either party, which he cannot waive, either (*a*) expressly by his pleadings or (*b*) impliedly, by going to trial on the merits. If the defendants wished to insist that the plaintiff had improperly brought her suit in the Federal Court, they should at the earliest moment have challenged the jurisdiction by a formal pleading of some sort; if the defendants intend to insist upon the defect of jurisdiction they should plead it the same as before the enactment of the statute of 1875 and if they do not, they should not be allowed to raise the question, although the Court may protect itself from imposition by dismissing on its own motion. That the defendants may waive the defect of jurisdiction is the fair inference from the language of this Court, though there seems to be no authority directly in point. This Court has said: "And when the defendant has not so pleaded as to entitle him to object to the jurisdiction," etc. *Hartog v. Memory*, 116 U. S. 588, quoted with approval in *Wetmore v. Rymer*, 169 U. S. p. 122. This language was used in reference to the exercise by the Court of the same power which the appellants insist the Court below should have exercised in their favor, although they submitted to the jurisdiction and did not so plead as to entitle them to challenge the jurisdiction. This language clearly implies that the parties may by their voluntary action waive the

defect, if any, of jurisdiction so that neither could complain if the Court *retains* jurisdiction. So far, the Federal jurisdiction has been sustained on some other point, and the Court has never, so far as we can find, been compelled to consider whether the defendant, who with full knowledge, submits to the jurisdiction, can insist that it is error in the Court to retain jurisdiction. Prior to the Act of 1875, jurisdiction must have been challenged by plea, or it was waived; this shows clearly that the *parties* may waive a defect of jurisdiction; and giving the Court the power on its own motion to dismiss, does not deprive the parties of the power to waive the question, and place themselves where they cannot complain if the Court retains a jurisdiction to which they have submitted.

The plaintiff cannot complain because he has alleged the diversity of citizenship; and the defendant cannot complain because he has, with full knowledge, voluntarily submitted to the jurisdiction without questioning it. In such a case the Court may inquire whether it is being imposed upon and, if so, it may dismiss the suit, but neither party has a legal right to a dismissal nor can either complain if the Court refuses to dismiss. If the Court should dismiss the action, then would arise the question whether the evidence creates a legal certainty that the Court is imposed upon; if not the dismissal would be error.

II.

No question of jurisdiction is presented by the record.

1. The assignments of error are clearly insufficient to raise the question of jurisdiction. The question argued by appellant relates wholly to the tendency or probative force of the testimony *as to residence;* the assignments of error do not even state that the proofs show that the residence of the plaintiff was in Washington; the only part of the assignments of error that come at all near to the question argued, is stated in this language: "The

Court erred * * * in denying defendants' motion to dismiss for want of jurisdiction." (Transcript of Record p. 35.) But this assignment of error requires the Court to look beyond it, and to a motion made in the Court below and from the motion to the testimony and from the testimony to Appellants' Brief; this places the real point attempted to be raised four removes from the assignment of error. The rule requires the *assignment* to state the question raised, and the Court will not go in search of the alleged error. It must be clearly stated. The other parts of the assignments of error are still more remote and indefinite. We submit that the assignments of error are clearly insufficient under the rule.

2. In the petition for appeal the question of jurisdiction is not stated at all except by reference to the assignments of error, which, we submit, are entirely insufficient, and in the order allowing the appeal *no* question of jurisdiction is stated. Transcript of Record, pp. 34-35.

3. In the certificate the question is stated in terms even more general than in the assignment of error. "Did the Court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?" is the form in which the question is stated in the certificate. Transcript of Record, p. 20.

Under the state, the rules, and the authorities, we submit, it is not enough to raise a question of jurisdiction but a *precise and definite question of jurisdiction* must be stated in the record. The jurisdiction of this Court depends upon the statement in the record, in some form, of a precise question of jurisdiction and not merely *a* question.

Our contention that the record must present a *precise* question of jurisdiction is a fair deduction from the authorities. *Van Wagenen v. Sewell*, 160 U. S. 369, p. 373; *Maynard v. Hecht*, 151 U. S. 324; *The Bayonne*, 150 U. S. 687.

III.

The Court below was clearly correct in its conclusion as to the diversity of citizenship. **Its opinion is in part a finding of facts; that part of the opinion constituting the finding of facts is as follows:**

"By the undisputed evidence it appears that she lived in the State of Massachusetts, and was permanently settled there, for a period of twenty years prior to the month of January, 1902, and at that time on account of failing health she disposed of a mercantile business which she had been carrying on, and went to Europe, then returned to Massachusetts, remained there a few days, and she then came to this Sate, bringing with her all of her personal effects, and took up her residence in a house which she owned. Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts."

In making this finding of fact the Court below had the advantage of the entire testimony which this Court has not, and, we submit, this finding, even in an equity case should be taken as at least *prima facie* correct. We will examine the Court's finding in detail.

1. "By the undisputed evidence it appears that she (the plaintiff below) lived in the State of Massachusetts and was permanently settled there for a period of twenty years prior to the month of January, 1902," etc. The undisputed evidence clearly supports this part of the Court's findings. In passing it should be remarked that the house which she owned, mentioned by the Court, was purchased while she was a resident of Massachusetts; of this there is no question; although the actual conveyance to her was not made until after her return from Germany; this purchase having been determined upon while she still actually resided in Massachusetts has but little bearing upon her intention as to her permanent home; she arranged to buy it while clearly domiciled in Massachusetts and its force as evidence of a change of domicil is very slight.

2. "Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also of deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother, and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts," will be treated as the second finding of fact. We submit, this part of the finding is clearly supported by the weight of the testimony. Mrs. McQuesten's testimony clearly sustains the finding; we quote her testimony on this point:

"Q. Before coming to this State, Mrs. McQuesten, where did you live?"

"A. I lived at Turner's Falls, Mass."

"Q. For how long a time had you lived at Turner's Falls?"

"A. I lived in Turner's Falls about twenty years."

"Q. When did you come to this State?"

"A. We came in June, 1902."

"Q. When you came here, Mrs. McQuesten, what was your purpose or intention as to residence or staying here?"

"A. I came here on the representation of these letters in regard to my health, one thing; having my boy learn his trade, and to live with my relatives, if we could possibly get along and if it all was agreeable, I should stay, otherwise I should not, that was my intention."

"Q. Have you had at any time any intention—any fixed intention to remain here?"

"A. If everything had been agreeable, and if everything would have been in my favor I didn't know as what I would have stayed; otherwise I felt that I was not obliged to stay unless I liked——"

"Q. Now what is your present intention as to staying here or going away?"

"A. My present intention is not to stay here but to go back to my old home, for how long I could not say, but I thought I would go back to look after my accounts and have my friends there. How long I cannot say."

Cross-examination.

"Q. Mrs. McQuesten, one of your objects in coming here was to get a situation for your son was it not?"

"A. Yes; I thought he could learn his trade here."

"Q. He did get a situation here for a while?"

"A. Yes, he got a situation, but it was nothing to learn there."

"Q. And it was also your desire to be near your friends and relatives?"

A. Yes. It was my desire, but it was not agreeable to be near them.

"Q. You came here and stayed a while and found it was not agreeable, but your idea in coming here, if I understand you directly, was first to get a situation for your son——"

A. First, my health was No. 1——"

The Master: "Wait until the question is completed."

"Q. (Continuing) Second to be near your friends and third your health? Those were the motives which induced you to come to Seattle?"

"A. Yes, I guess so. I had never been in Seattle; I didn't know what it was; I came in response to these letters." pp. 26-27.

This testimony clearly shows that she came to Seattle in impaired health and with a view to see what the effect would be of a change of climate, and to be near her relatives if she found it agreeable, and to have her son learn his business or trade. Whether the climate of Washington would improve her health she knew not, whether a residence near her relatives would be agreeable she knew not; and whether her son could obtain a position she knew not; manifestly until she did *know* these things she would not form an intention to remain. Before that intention was formed she learned that the climate did not improve her health; her son could not obtain the advantages she desired in the way of learning his trade; and she soon found that residence near her relatives was not agreeable; so that without forming any positive, actual intention to remain she found that every purpose she had in mind would be defeated if she remained and she definitely concluded to return. Now, one who goes to a strange country, with a view to regain his health and without any knowledge of the country to which he goes, will not be deemed to have determined to remain until the effect of the climate upon his health can be felt; this is self evident. *And if, after having tried the climate, he concludes to go back, there is no point of time when it can be said he intended to remain, and without an actual intention to remain, there is no change of domicil*

or citizenship.

A change of residence for purposes of health does not work a change of domicil.

Fidelity Trust etc. Co. v. Preston, 28 S. W. Rep., 658.
Still v. Woodville, 38 Miss. 646.
Ex parte Blumer, 27 Tex. 734.
Dupuy vs. Wurtz, 53 U. Y. 556.

The testimony of the plaintiff is practically uncontradicted; but two witnesses give any testimony on behalf of the defendants as to the citizenship of the plaintiff; one of these, Elizabeth Bamburger, (Transcript of Record, p. 26) simply says that "so much as she understood," the plaintiff was to make Seattle her home, but she evidently made no distinction between a temporary sojourn and permanent home or domicil; the other of these witnesses was the defendant Nicholas J. Steigleder himself, and the Court below, after reading his entire testimony, concludes that he is a "mendacious witness." Transcript of Record, p. 14. In any event his testimony does not show that the plaintiff had changed her domicil; it merely shows a change of residence, and this is fully explained and is consistent with the fact of domicil in Massachusetts. The letters to which the plaintiff referred in her testimony were written to her by the defendant Nicholas J. Steigler urging her to come to Washington and making representations as to the advantages of leaving her home in Massachusetts and taking up a residence in Washington. These letters certainly would not be evidence of anything except that the writer, Nicholas J. Steigleder, made certain statements; they are not evidence against the plaintiff (Respondent in this Court) that she intended to change her domicil from Massachusetts to Washington. Naturally, if she was induced by the statements to come to Washington, she would have a reasonable time to determine whether the representations were true and

whether she wished to remain, and if, before she finally concluded to remain, she found the conditions in Washington disagreeable to her, and for that reason concluded to return, there is no point of time on which the Court can fix when it can say, "Then she concluded to remain in Washington;" and never having concluded to remain in Washington she never had a domicil there.

The Court below should not dismiss the action unless there is a legal certainty of a want of jurisdiction.

Wetmore v. Rymer, 169 U. S. 115-120-121-122.
Deputron v. Young, 134 U. S. 241.
Barry v. Edmunds, 116 U. S. 550.
Maffet v. Quine, 95 Federal, 200.

In Wetmore v. Rymer, supra, the parties had gone to trial on the merits, without raising the question of jurisdiction; on the trial some evidence was introduced which, the defendants insisted, showed want of jurisdiction; the defendants moved to dismiss. The motion of the defendants was not regarded as a pleading challenging the jurisdiction, but as a mere suggestion to the Court invoking the power of the court under the Act of 1875 to dismiss where the action is not really of Federal cognizance.

If, as the authorities hold, the cuit should not be dismissed unless there is a legal certainty of want of jurisdiction, then, when the Court below deliberately passes on the question of fact, and retains its jurisdiction, the legal certainty of a want of jurisdiction is wholly wanting and it would be error to dismiss.

In conclusion we submit:

1. That the appellants, by their conduct, have waived the defect, if any, of jurisdiction, or in other words have by their conduct estopped themselves to question the jurisdiction of the Court below.

2. That no question of jurisdiction is presented by the record; and

3. That there is a diversity of citizenship, as the Court below found, as a matter of fact from the testimony; and there is, therefore, not a clear want of Federal jurisdiction.

The judgment of the Court below should be affirmed.

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